



**CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE**

December 7, 2007

S. 2248

FISA Amendments Act of 2007

*As reported by Senate Committee on the Judiciary
on November 16, 2007*

SUMMARY

The Foreign Intelligence Surveillance Act Amendments Act of 2007 would make several modifications to the Foreign Intelligence Surveillance Act (FISA) and repeal several sections added to FISA by the Protect America Act of 2007 (Public Law 110-55).

The bill would grant authority to the Attorney General and the Director of National Intelligence (DNI) to authorize surveillance of individuals or groups outside the United States. Such authorizations would permit the incidental acquisition of communications of individuals located within the United States so long as procedures are in place to minimize such acquisitions and to ensure that surveillance is targeted at individuals outside the United States. Under the bill, the Foreign Intelligence Surveillance Court (FISC) would be authorized to review those procedures and to order the government to modify them if the court finds they are inadequate or violate the Constitutional protections against unreasonable search and seizure.

Section 101 of the bill would restrict the ability of the government to target U.S. persons located outside of the United States pursuant to authorizations by the Attorney General and DNI. Under the bill, if the government targets a U.S. person overseas but intends to acquire that individual's communications in the United States, the government must follow the traditional FISA warrant process for electronic surveillance. The bill would require the government to submit an application to the FISC in cases where the government wishes to target a U.S. person overseas intending to acquire that individual's communications outside the United States if that individual had a reasonable expectation of privacy and a warrant would normally be required in the United States. If the government can show that the target is a foreign power or an agent of a foreign power, the bill would authorize the FISC to approve the surveillance.

Since this bill would require the Attorney General and DNI to forward certifications to the FISC regarding the authorization of surveillance of overseas targets and would require the court to review such certifications, the bill would increase discretionary costs associated with such oversight of surveillance programs. However, CBO does not have access to information regarding the amount of surveillance that would be affected by the bill or the current costs incurred by agencies involved with conducting and authorizing such surveillance. Thus, CBO cannot predict how implementing this bill might affect the budget. Any changes in federal spending under the bill would be subject to the appropriation of the necessary amounts. Enacting the bill would not affect direct spending or revenues.

The Unfunded Mandates Reform Act (UMRA) excludes from the application of that act any legislative provisions that are necessary for national security. CBO has determined that the portions of sections 101, 105, and 107 of S. 2248 that would authorize certain electronic surveillance and physical searches without a court order in an emergency situation fall under that exclusion, and CBO has not reviewed those provisions for intergovernmental or private-sector mandates.

Other provisions of the bill contain intergovernmental mandates as defined in UMRA, but CBO estimates that the costs of those mandates to state and local governments would not exceed the annual threshold established in UMRA (\$66 million in 2007, adjusted annually for inflation).

S. 2248 also contains a private-sector mandate as defined in UMRA by requiring certain entities to assist the government with electronic surveillance. Because CBO has no information about the prevalence of electronic surveillance and the cost of compliance for entities assisting the government with electronic surveillance, CBO has no basis for estimating the costs of the mandate or whether the costs would exceed the annual threshold established by UMRA for private-sector mandates (\$131 million in 2007, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Since CBO does not have access to information regarding the prevalence of surveillance that would be affected by the bill, or the current costs incurred by agencies involved with conducting and authorizing such surveillance, CBO cannot predict how implementing this bill might affect the budget. Any changes in federal spending under the bill would be subject to the appropriation of necessary amounts. Enacting the bill would not affect direct spending or revenues.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

The Unfunded Mandates Reform Act excludes from the application of that act any legislative provisions that are necessary for national security. CBO has determined that the portions of sections 101, 105, and 107 of S. 2248 that would authorize certain electronic surveillance and physical searches without a court order in an emergency situation fall under that exclusion, and CBO has not reviewed those provisions for intergovernmental or private-sector mandates.

Estimated Impact on State, Local, and Tribal Governments

Provisions of the bill contain intergovernmental mandates as defined in UMRA, but CBO estimates that the costs of those mandates to state and local governments would not exceed the annual threshold established in UMRA.

If electronic communication service providers comply with certain federal requests for information, the bill would protect them from future liability. Therefore, the bill would preempt some state and local liability laws, and it would eliminate the ability of a public entity to pursue legal action against a service provider. The preemption and the elimination of a legal course of action would be intergovernmental mandates. Information about the nature of existing and potential claims is severely limited, but CBO assumes that few state, local, or tribal governments would act as plaintiffs in such cases. Consequently, we estimate that the costs of the mandates would be small.

The bill also would allow federal law enforcement officers to compel communications service providers, including libraries and other public institutions, to provide information about their customers and users. Based on information from a recent survey of public libraries, CBO estimates that the number of requests and associated costs would likely be small. The bill also would direct the federal government to compensate entities for providing such information.

Estimated Impact on the Private Sector

S. 2248 contains a private-sector mandate as defined in UMRA by authorizing the Director of National Intelligence and the Attorney General to direct certain electronic communication service providers to provide the government with all information, facilities, and assistance necessary to conduct electronic surveillance and to acquire foreign intelligence. Because CBO has no information about how often such entities would be directed to provide assistance or the costs associated with providing assistance, CBO has no basis for estimating

the costs of the mandate or whether the costs would exceed the annual threshold established by UMRA for private-sector mandates. The bill also would direct the government to provide compensation, at the prevailing rate, to persons providing information, facilities, or assistance.

PREVIOUS CBO ESTIMATES

On October 26, 2007, CBO transmitted a cost estimate for the FISA Amendments Act of 2007, as ordered reported by the Senate Select Committee on Intelligence. That version of the bill did not contain the provision found in section 110 of this bill requiring an audit of the “Terrorist Surveillance Program,” and authorizing additional personnel for that purpose. To the extent that section 110 would require additional funding for such personnel, the costs associated with implementing this legislation could exceed the costs associated with implementing the version reported by Senate Select Committee on Intelligence. In addition, while both the Intelligence and Judiciary Committees’ legislation would protect communication service providers from future liability claims resulting from compliance with federal requests, the earlier version of the bill also included a retroactive liability exemption.

On October 12, 2007, CBO transmitted cost estimates for H.R. 3773, the RESTORE Act of 2007, as ordered reported by the House Permanent Select Committee on Intelligence and the House Committee on the Judiciary on October 10, 2007. Both versions of H.R. 3773 would require the government to apply to the FISC for authorization to conduct surveillance on individuals overseas if such surveillance also would result in the government obtaining the communications of individuals located in the United States. In contrast, S. 2248 would allow the Attorney General and Director of National Intelligence to authorize such surveillance while providing certifications to the FISC that procedures have been put in place to ensure that individuals in the United States are not targeted for surveillance and that the acquisition of communications to or from individuals in the United States is minimized.

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